

No. 80-1684

**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

UNITED STATES OF AMERICA  
*Plaintiff-Appellee*

-VS-

ANTHONY TASSONE  
*Defendant-Appellant*

**ORDER**

(Filed: December 27, 1982)

Before: MERRITT and CONTIE, Circuit Judges; and  
NEESE, District Judge.\*

The defendant Tassone has petitioned the panel for rehearing. Upon consideration, the petition is denied.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman, *Clerk*

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\* The Honorable C. G. Neese, United States District Judge for the Eastern District of Tennessee, sitting by designation.

Nos. 80-1657; 80-1684; 81-1382

**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

UNITED STATES OF AMERICA  
*Plaintiff-Appellee*

-VS-

BENJAMIN SERIDO, (80-1657)  
ANTHONY TASSONE, (80-1684)  
LARRY KOOJI KUNITAKE, (81-1382)  
*Defendants-Appellants*

**ORDER**

(Filed: October 13, 1982)

Before: MERRITT and CONTIE, Circuit Judges; and  
NEESE, District Judge.\*

John P. Hehman, *Clerk*

These cases involve the appeals by defendants Serido, Tassone and Kunitake of their convictions involving a horse race fixing scheme in Detroit, Michigan. These defendants, as well as five other co-defendants, were charged in a seven-count indictment for their participation in a conspiracy to knowingly influence, by fraud and bribery, thoroughbred horse races at the Detroit Race Course and the Hazel Park Race Track. Count 1 charged the defendants with the use of wire communications in the execution of a scheme and artifice to defraud in violation of 18 U.S.C. §1343. Count 2 charged the defendants with participating in a bribery conspiracy of sporting events in violation of 18 U.S.C. §224. Counts 3 through 7 charged various defendants with participating in the fixing of specific races on specific dates.

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\* The Honorable C. G. Neese, United States District Judge for the Eastern District of Tennessee, sitting by designation.

Defendant Serido was charged with violating counts 1, 2 and 4 and was found not guilty on count 4 but guilty as to counts 1 and 2. Defendant Tassone was charged with violating counts 1 through 7 but was found guilty of counts 2 through 7. The trial court declared a mistrial as to count 1. Defendant Kunitake was charged with violating counts 1, 2, 5 and 6. He was acquitted on count 1 and the district court declared a mistrial with regard to counts 2, 5 and 6. He was then retried and found guilty of counts 2, 5 and 6.

The conspiracy to knowingly influence horse racing at the two race tracks was initiated and orchestrated by undicted co-defendant Anthony Ciulla. Mr. Ciulla was the government's key witness in the conviction of these defendants. He was granted immunity in exchange for his testimony. Mr. Ciulla put together this conspiracy by the following means: (a) obtaining financial backing for the scheme from defendant Tassone, (b) bribing owners, trainers and groomers to allow access to horses for the purpose of administering drugs and stimulants, (c) bribing jockeys to manipulate the outcome of horse races, (d) causing and attempting to cause certain persons to place wagers on certain predetermined races for the purpose of increasing profits from wagering pools, and (e) administering drugs and stimulants to race horses.

The three defendants have raised several issues concerning their convictions. We find no merit in these assignments of error, however, and we affirm all three convictions.

Defendants Tassone and Serido first assert prosecutorial misconduct in violation of their due process rights. They assert that the prosecutor improperly used the testimony of witness Ciulla knowing said testimony to be false and perjured.

Ciulla testified that in June, 1973, he met with defendants Tassone and Serido in Detroit, Michigan. At this time, however, Tassone was in prison in New Jersey. Defendant Tassone introduced prison records, as well as

the testimony of two prison officials, indicating that he was incarcerated in June when this meeting allegedly occurred. The defendants claim that the government deliberately deceived the jury by using the testimony of Ciulla concerning the Detroit meeting in June, 1973. The defendants assert that the government had a duty to refrain from using this testimony or a duty to correct it when it appeared.

Due process is violated when a prosecutor obtains a conviction with the aid of evidence which he knows is false regardless of whether such evidence concerns the prosecutor's proof or the credibility of a witness. *Napue v Illinois*, 360 U.S. 264 (1959). Further, due process is violated and a new trial is required when a prosecutor intentionally or inadvertently fails to correct materially false testimony relevant to the credibility of a key government witness. *Giglio v United States*, 405 U.S. 150 (1972).

In the present case, there is no evidence that the prosecutor knowingly used perjured testimony. First, there is no evidence that the testimony of the government's witness was deliberately falsified concerning the June meeting. Second, the government records indicate that defendant Tassone was arrested on May 23, 1973, and that he was incarcerated in the Trenton State Prison on July 9, 1973. It is not clear, however, that the government knew that the defendant was jailed in the Mercer County Jail since May 25, 1973. At the time that Ciulla testified, we cannot find that the government knew that defendant Tassone was in prison for the entire month of June. Further, records of arrest or incarceration do not conclusively prove that such a meeting could not have possibly occurred. Conceivably, the defendant may have obtained leave from prison for some reason. *See United States v Indelicato*, 611 F.2d 376 (1st Cir. 1979).

Assuming arguendo, however, that prosecutorial misconduct exists in this case, we do not believe that the defendant was prejudiced thereby. A new trial is required only when the tainted evidence was material to the case.

And, the materiality requirement recognizes that the misconduct's effect on the trial, not the blameworthiness of the prosecutor, is the crucial inquiry for due process purposes. *Smith v Phillips*, \_\_\_\_ U.S. \_\_\_\_, 102 S.Ct. 940 (1982). The only question is whether the defendants received a fair trial.

In the cases *Napue* and *Giglio*, *supra*, neither the prosecutor nor defense counsel had knowledge that the prosecution witnesses' testimony was false. In the present case, however, the defense counsel were aware that, contrary to the testimony of Ciulla, defendant Tassone was incarcerated during the month of June, 1973. Further, the defense counsel chose not to cross-examine Ciulla concerning the inconsistency. Rather, Ciulla's testimony was impeached by the introduction of prison records and the testimony of prison officials that defendant Tassone was incarcerated at the time that the Detroit meeting was to take place.

Unlike *Napue* and *Giglio*, *supra*, therefore, the trial in this case was not substantially affected by the inaccessibility, at the time of trial, of information that would enable the defendants to bring the matter before the jury for its evaluation. *United States v Bruner*, 657 F.2d 1278 (D.C. Cir. 1981); *United States v Iverson*, 648 F.2d 737 (D.C. Cir. 1981); *Ross v Heyne*, 638 F.2d 979 (7th Cir. 1980). The defendants were provided with an adequate opportunity for cross-examination and impeachment concerning the allegedly perjured and at least inconsistent evidence. We cannot find that the defendants have been denied a fair trial.

The defendant Tassone further argues, however, that Ciulla's testimony caused him to introduce prejudicial evidence. Defendant Tassone asserts that in order to impeach Ciulla's testimony he was required to introduce the prejudicial evidence that he was incarcerated during the relevant period. Reviewing the evidence in this case, however, we find that this argument is without merit. The government

introduced evidence of Tassone's incarceration in proving that Ciulla met with Tassone in August, 1973 at the Trenton State Prison. Thus, the jury would have known of Tassone's incarceration even if Ciulla's testimony concerning the Detroit meeting was not contradicted by the prison evidence.

Defendant Tassone raises two additional issues. First, he asserts that the district court improperly coerced a juror to vote in open court. On May 12, 1980, the jury foreperson advised the trial court that the jury could not reach a verdict regarding some of the defendants. The court was advised, however, that the jury had arrived at a verdict concerning defendants Serido and Tassone. By agreement of counsel, the jury was asked to return a verdict concerning the defendants on which it could agree. The jury found Tassone guilty of counts 1 through 7. The court then polled the jury, pursuant to rule 31 (d) of the Federal Rules of Criminal Procedure, and foreperson Klea responded that as to Tassone it was not her verdict. After a bench conference with counsel, the court then questioned Mrs. Klea as to each count against defendant Tassone. She first responded that it was her verdict on each count. But, upon a second poll, Mrs. Klea stated that it was not her verdict as to count 1 but that it was her verdict as to the remaining counts.

Upon review of the transcript of the colloquy between the court and foreperson Klea, we find that the district court's inquiry was not coercive. The purpose of a jury poll is to determine if there is a valid verdict based on unanimity. *United States v Love*, 597 F.2d 81 (6th Cir. 1979). If a lack of unanimity is discovered, the district court may either discharge the jury or retire it for further deliberations. The court, however, may question a juror to clarify a verdict and to elicit an unequivocal expression of the juror's vote. *United States v Lockhart*, 366 F.Supp. 843 (E.D. Pa. 1973), *aff'd*, 495 F.2d 1369 (3d Cir. 1974).

In the present case, foreperson Klea had already made her decision concerning the Tassone verdict and the district court's inquiry only identified that the lack of unanimity existed only with regard to count 1. Foreperson Klea was not coerced into surrendering a view conscientiously entertained.

Tassone finally argues that the trial judge should have recused himself under the provisions of 28 U.S.C. §455(a). The Detroit Race Course and Hazel Park Race Track were owned and operated by two individuals who, along with the trial judge, held an ownership interest in an apartment complex. The trial judge owned a 13.3% interest in the apartment complex and the two race track owners owned a 50% interest. The race track owners acquired their interest independent of and after the trial judge had acquired his interest. No other relationship existed between these individuals, and the trial judge did not associate with the race track owners personally or in any other way. This relationship was revealed to counsel by the trial judge upon discovery during the second day of impaneling the jury.

Section 455(a) provides:

Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Under the provisions of this statute, a trial judge must disqualify himself if a reasonable man, were he to know all the facts and circumstances, would harbor doubts as to the judge's impartiality. *Potashnick v Port City Construction Co.*, 609 F.2d 1101 (5th Cir.), cert. denied, 449 U.S. 820 (1980). Under the facts of this case, we find that the trial court did not abuse its discretion in refusing to recuse himself. The court revealed the relationship to counsel to avoid any appearance of partiality. Further, the court disclosed that no interest or relationship existed between himself and the two race track owners other than the collateral

business relationship. Finally, the court tried the case with the assistance of a jury. We conclude that a reasonable man, with knowledge of these facts, would not question the trial court's impartiality in this case based on a remote business association. Additionally, the trial judge possessed no financial interest in the subject matter in controversy or in a party to the proceeding. 28 U.S.C. §455(b) and (d).

Defendant Serido raises five issues in addition to the claim of prosecutorial misconduct. First, he asserts that the district court failed to fully investigate the possibility of improper contact with a juror. On May 8, 1980, the trial court's law clerk received a phone call from an unknown woman stating that she was a juror. She stated that one of the jurors told other jurors that she got drunk with her husband, discussed the case with him and that her husband told her what to do on the case. The clerk asked for the juror's name but the woman hung up.

The trial court conducted an in-chambers questioning of foreperson Klea concerning the call. Mrs. Klea stated that she did not hear any such talk. Mrs. Klea, however, told the court she had drawn her own conclusion and then attempted to relate something to the court. The court refused to allow Mrs. Klea to relate anything further. The Court then re-instructed the entire jury concerning their duty as jurors. Finally, upon the jury's rendering of a verdict, the court questioned each juror concerning the phone call and found that none of the jurors had knowledge of the phone call or its subject matter. The trial court refused to allow inquiry of Mrs. Klea concerning what she wished to relate to the court on the basis of Federal Rules of Evidence 606(b).

The trial court had a duty to inquire into the character of potentially prejudicial material, the extent of the exposure and its effect on the jury's ability to render an impartial verdict. *United States v Spinella*, 506 F.2d 426 (5th Cir.), cert. denied, 423 U.S. 917 (1975). But the court also had a duty to be careful not to make inquiry with regard to



the jury's deliberation of the evidence. *Fed. R. Evid.* 606(b). In this case, the court determined that all of the jurors had no knowledge of the phone call or the subject matter of the call. Having made this determination, that no improper jury contact occurred, the court properly refused inquiry into what Mrs. Klea attempted to tell the court in-chambers.

Defendant Serido next contends there was a fatal variance between the single conspiracy alleged in the indictment and the two conspiracies proven at trial. He also asserts that the evidence revealed a conspiracy between himself and co-defendant Owens, of receiving payment from clients for information on how to wager on certain races, which is not conduct violative of the sports bribery statute, 18 U.S.C. §224. We disagree. Unlike the case *Kotteakos v United States*, 328 U.S. 750 (1946), the evidence indicates that the scheme of Serido and Owens became part of Ciulla's bribery conspiracy. Ciulla's testimony reveals that the clients of Serido and Owens were used in order to get them to wager on certain fixed races, thereby increasing profits within the wage earning pools. Thus, the government sufficiently proved one conspiracy as well as conduct violative of 18 U.S.C. §224. *United States v Phillips*, 630 F.2d 1138, 1146 (6th Cir. 1980).

Related to these claims, we also find that there exists sufficient evidence to sustain Serido's convictions on counts 1 and 2. Determining the sufficiency of the evidence requires the Court to view the evidence in a light most favorable to the government, *Glasser v United States*, 315 U.S. 60 (1942), and to determine whether there exists sufficient evidence for a rational juror to find that the defendant is guilty beyond a reasonable doubt. *U.S. v Francis*, 646 F.2d 251, (6th Cir.) cert. denied, \_\_\_ U.S. \_\_\_, 102 S.Ct. 637 (1981). Under this standard, credibility choices must be determined in favor of the government. Accordingly, the testimony of the government's witness Ciulla is sufficient to implicate defendant Serido in the conspiracy charged in counts 1 and 2.

Finally, defendant Serido contends that an in-court identification by F.B.I. agent Langford should have been excluded because of the out-of-court identification procedures used. Assuming this in-court identification was based on unreasonably suggestive out-of-court identifications and was unreliable under the totality of the circumstances, *Neil v Biggers*, 409 U.S. 188 (1972), we find this error to be harmless. This identification evidence was cumulative in that witness Ciulla and another FBI agent identified Serido as being with Ciulla on September 15, 1973. Additionally, defendant Serido was acquitted on count 4, which charged Serido with participating in the fixing of the tenth race on September 15, 1973. No prejudice to the defendant occurred as a result of the introduction of this evidence.

Defendant Kunitake has raised two issues: that he was granted immunity from prosecution in exchange for his grand jury testimony; and, that the district court improperly limited the cross-examination of witness John Hamilton concerning an extortionate demand allegedly made by Ciulla in 1978. Reviewing the entire record as well as the parties' briefs, we conclude that the district court's finding, that no informal grant of immunity was given to Kunitake in exchange for his grand jury testimony, was not clearly erroneous. We, therefore, find *Santobello v New York*, 404 U.S. 257 (1971), inapplicable. Further, the fact that the district court excluded the defendant's grand jury testimony, based on a finding that the defendant possessed a subjective belief that immunity had been granted, rendered any error harmless.

In regard to the limit placed on the cross-examination of witness John Hamilton during the course of defendant Kunitake's second trial, we find that the district court did not abuse its discretion. Hamilton's testimony was a general attack on the credibility of the government's key witness. The evidence was offered only to show Ciulla's willingness to fabricate testimony. It was not a particular attack directed toward revealing biases, prejudices or ulterior mo-

tives of the government's witness as they relate to the issues in this case. *Davis v Alaska*, 415 U.S. 308 (1974). The district court properly excluded the extrinsic evidence under Federal Rules of Evidence, 609(a) and (b). *See United States v Withers*, 637 F.2d 445 (6th Cir. 1980).

Accordingly, the convictions of all three defendants are hereby **AFFIRMED**.

**AFFIRMED BY ORDER OF THE COURT.**

(s) John P. Hehman, *Clerk*

**ISSUED AS MANDATE ON CASE NOS. 80-1657 and 80-1684 ONLY**

January 4, 1983

**COSTS: NONE**